Supreme Court, U.S.
FILED

08-232 APR 15 2008

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

BIJAN DANESHVAR - PETITIONER
v.
GRAPHIC TECHNOLOGY, INC. - RESPONDENT

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Bijan Daneshvar,
Petitioner, Pro Se
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Overland Park, Kansas 66204
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QUESTION PRESENTED FOR REVIEW

Did the District Court error in failing to grant petitioner's motion for relief for a prior adverse judgment under Rule 60(b), Federal Rules of Civil Procedure based on newly discovered evidence of forgery?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____ ___; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 18, 2008

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. ____A_____.
The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

STATEMENT OF THE CASE

Petitioner originally filed a pro se complaint against respondent claiming violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The alleged violations included unfair discharge, failure to promote, unequal terms and conditions of employment, retaliation, and additional discriminatory acts under Title VII. The district court dismissed several claims for lack of subject matter jurisdiction, and granted summary judgment to GTI on the balance of the claims. See *Daneshvar v. Graphic Tech., Inc.*, 433 F. Supp. 2d 1244 (D. Kan. 2006); *Daneshvar v. Graphic Tech., Inc.*, 2006 WL 266603 (D. Kan. Feb. 1, 2006); *Daneshvar v. Graphic Tech., Inc.*, 2006 WL 14565 (D. Kan. Jan. 3, 2006).

When respondent filed its second petition for summary judgment in the district court proceeding, the company's alleged wage payment policies regarding pay differentials was used to support the difference between different employee classifications. However, no actual policy was ever produced but rather the policy was referenced to in an affidavit. Petitioner opposed the summary judgment in part on the grounds that the affidavit was not made on personal knowledge and lacked "rudimentary foundational elements for admissibility" required for an admissible affidavit. The district nevertheless granted summary judgment.

After judgment was entered but within the time allowed under Rule 60(b), petitioner requested relief on the grounds of newly discovered evidence. That evidence consisted of a showing that the alleged policy never

existed at the time of petitioner's employment. In addition, no subsequent pay policy that would apply to petitioner's situation was ever created. Further, petitioner who was acting pro se showed the court that as a non-attorney he was not provided access to court's ECF system. Furthermore, petitioner never received copies of certain documents that were attached as exhibits to the second summary judgment motion. Petitioner presented the court with evidence which, it was not until after the summary judgment that he was able to obtain the documentation necessary to oppose summary judgment. He further offered an explanation that the undisclosed documents bearing the affiant's name were prepared and signed by someone other than the affiant. Petitioner then filed a timely motion for relief from the judgment under Rule 60(b).

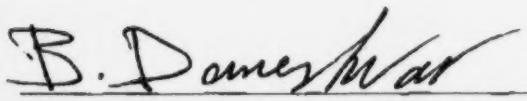
REASONS FOR GRANTING THE PETITION

Petitioner contends that by misrepresentations that covered up the real reasons for respondent's actions his right to a trail on the merits was improperly denied. Not granting him the requested relief results in a serious injustice. Respondent obtained summary judgment based on affidavits not properly admissible and supported as required by Rule 56, Fed. R. Civ. P. Petitioner further asserts that if he been granted relief under Rule 60(b) and provided the opportunity to utilize the newly discovered evidence, he would have been able to set aside the summary judgment and been afforded a right to a trial on the merits of his claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Bijan Danesvar, Petitioner Pro Se

Date: June 20, 2008

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BIJAN DANESHVAR, Plaintiff-Appellant, v. GRAPHIC TECHNOLOGY, INC., Defendant-Appellee.	No. 07-3240 (D. Kansas) (No. 2:04-CV-02212-JWL)

ORDER AND JUDGMENT*

Before **HENRY**, Chief Judge, **TYMKOVICH**, and **HOLMES**, Circuit Judges.**

Bijan Daneshvar, formerly employed by Graphic Technology, Inc. (GTI), appeals the district court's dismissal of his motion for relief from judgment filed pursuant to Rule 60(b). For the reasons explained below, we affirm the distric court's dismissal.

Footnotes

* This order and judgment is not binding precedent

I. BACKGROUND

Mr. Daneshvar filed a pro se complaint against GTI alleging several violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The alleged violations included unfair discharge, failure to promote, unequal terms and conditions of employment, retaliation, and additional discriminatory acts under Title VII. The district court dismissed several claims for lack of subject matter jurisdiction, and granted summary judgment to GTI on the balance of the claims. *See Daneshvar v. Graphic Tech., Inc.*, 433 F. Supp. 2d 1244 (D. Kan. 2006); *Daneshvar v. Graphic Tech., Inc.*, 2006 WL 266603 (D. Kan. Feb. 1, 2006); *Daneshvar v. Graphic Tech., Inc.*, 2006 WL 14565 (D. Kan. Jan. 3, 2006). We affirmed the distric court's judgment on May 15, 2007, and the mandate issued on June 6, 2007. *See Daneshvaar v. Graphic Tech., Inc.*, 237 F. App'x 309 (10th Cir. 2007).

Footnotes (continued from page 1a)

except under the doctrines of the law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* FED. R.APP. P. 34(f) AND 10TH CIR. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Mr. Daneshvar filed a motion pursuant to Fed. R. Civ. P. 60(b) seeking relief from the district court's judgment. In his motion for relief from judgment, Mr. Daneshvar contended that he had newly-discovered evidence of conspiracy, cover-up, forgery, and fraud that supports the revisiting of his claims regarding disparate wages and wrongful discharge. Mr. Daneshvar also contended that GTI and its counsel have engaged in misconduct including fabrication of documents and submission of perjured testimony. The district court concluded that the evidence Mr. Daneshvar presented in his response to GTI's motion for summary judgment. The district court also reprimanded Mr. Daneshvar for his bald and unsupported assertions regarding GTI's counsel's misconduct. Mr. Daneshvar now appeals.

II. DISCUSSION

"We review a district court's denial of a Rule 60(b) motion for an abuse of discretion. *Amoco Oil Co. v. United States Envt'l Protection Agency*, 231 F.3d 694, 697 (10th Cir. 2000). "Parties seeking relief under Rule 60(b) have a higher hurdle to overcome because such a motion is not a substitute for an appeal." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.*, 909 F.2d 1437, 1440 (10th Cir. 1990). "Rule 60(b)[] relief is . . . difficult to attain and is appropriate only when it offends justice to deny such relief." *Zurich N. Am. v. Matrix Serv. Inc.*, 426 F. 3d 1281, 1293 (10th Cir. 2005) (citiation and internal quotation marks omitted). "Given the lower court's discretion, the district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." *Id.* at 1289 (internal quotation marks omitted). We do not

find a definite, clear or unmistakable error, and therefore affirm.

Indeed, we have reviewed plaintiff's Rule 60 motion, and conclude that Mr. Daneshvar does not endeavor to offer any justification for the delayed reference to these allegations, when the evidence appears to have been in his possession during the summary judgment proceedings.

III. CONCLUSION

Accordingly, we AFFIRM the district court's denial of Mr. Daneshvar's Rule 60 (b) motion.

Entered for the Court,
Robert H. Henry
Chief Circuit Judge
(unsigned)

BEST AVAILABLE COPY

Appendix B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Bijan Daneshvar,

Plaintiff,

v. **Case No. 04-2212-JWL**

Graphic Technology, Inc.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Bijan Daneshvar filed a pro se complaint against his former employer alleging numerous violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. In previous orders, the court dismissed for lack of subject matter jurisdiction several claims asserted by plaintiff, inlcuding plaintiff's wrongful discharge claim, and granted summary judgment in favor of defendant on all other claims, including plaintiff's disparate wage claim. *See Daneshvar v. Graphic Tech., Inc.*, 433 F. Supp. 2d 1244 (D. Kan. 2006); *Daneshvar v. Graphic Tech., Inc., 2006* WL 266603 (D. Kan. Feb. 1, 2006); *Daneshvar v. Graphic Tech., Inc.*, 2006 WL 14565 (D. Kan. Jan. 3, 2006).

Plaintiff appealed to the Tenth Circuit, asserting that this court erred in dismissing plaintiff's wrongful discharge for failure to exhaust administrative remedies and considering certain affidavits in granting summary judgment on his disparate wage claim. On May 15, 2007,

the circuit affirmed this court's judgment, concluding that the court properly dismissed plaintiff's wrongful discharge claim and properly relied on the affidavits. The mandate issued on June 6, 2007.

On June 4, 2007, plaintiff filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) "on the grounds of newly discovered evidence, conspiracy, perjury, forgery and fraud." In his motion, plaintiff contends that certain evidence which could not have been discovered in time to seek relief under Rule 59(e) shows that summary judgment should not have been granted and that defendant and its cousel have committed fraud. This matter, then, is presently before the court on plaintiff's Rule 60(b) motion and, as explained below, that motion is denied.

A district court may consider a Rule 60(b) motion to reopen a decision that has been affirmed on appeal when the basis for the motion was not before the appellate court or resolved on appeal. *FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1273 (10th Cir. 1998) (citing *Standard Oil Co. of Calif. v. United States*, 429 U.S. 17, 18-19 (1976)). Nonetheless, Rule 60(b) is "not available to allow a party merely to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for representation at the time of the original argument." *Id.* at 1272 (quoting *Cashner v. Freedom Stores, Inc.*, 98 F. 3d 572, 577 (10th Cir. 1996)). Without exception, the arguments and evidence presented by plaintiff in his Rule 60(b) motion could have been-and should have been-presented in response to defendant's motion for summary judgment. While plaintiff asserts that the evidence is "newly" discovered, he does not support that contention

with any facts and a review of plaintiff's motion and supporting memorandum reveals that the motion is based on evidence that has been in plaintiff's possession since at least the summary judgment stage. *See Beugler v. Burlington N. & Santa Fe Ry. Co.*,___F.3d ___, 2007 WL 1895471, at *4 (10th Cir. July 3, 2007) (no abuse of discretion in denying Rule 60(b) motion where evidence was "known or discoverable before the court entered summary judgment" in favor of defendant).[1] Moreover, while plaintiff baldly asserts that defendant and its counsel have engaged in misconduct, including fraud, by fabricating documents and submitting perjured testimony, plaintiff does not support those conclusory assertions with any specific facts whatsoever. *See Zurich North America v. Matrix Serv., Inc.,* 426 F.3d 1281, 1290-91 (10th Cir. 2005) (a party relying on Rule 60(b)(3) must, by adequate proof, clearly substantiate the claim of fraud, misconduct or misrepresentation). Plaintiff, then, has not shown exceptional circumstances warranting relief from judgment and the motion is therefore denied. *See Allender v. Raytheon Aircraft Co.,* 439 F.3d 1236, 1242 (10th Cir. 2006) (relief under Rule 60(b) is extraordinary and may only be granted in excepional circumstances).

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[1]To the extent plaintiff's motion is supported by the affidavit of his daughter, that affidavit, while only recently obtained, is not "new" for purposes of Rule 60(b). *See Farmland Indus., Inc. v. National Union Fire Ins. Co.,* 2004 WL 2958458, at *2 (D. Kan. Dec. 16, 2004) (plaintiff's belated attainment of affidavit is not newly discovered evidence because plaintiff could have obtained the affidavit prior to the court's decision granting summary judgment).

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (doc. 127) is denied.

IT IS SO ORDERED.

Dated this 17th day of July, 2007, at Kansas City, Kansas.

s/John W. Lungstrum
John W. Lungstrum
United States District Judge
(unsigned)

Appendix C

Wendy Carlson
Questioned Document Examiner
1550 Larimer Street, Suite 609 * Denver, Colorado
80202
Phone: 303/330-8636 * Fax: 303/265-9087
wendy@handwritingexpertdenver.com
www.HandwritingExpertDenver.com

Questioned Document Examiner Letter of Opinion

June 10, 2008
Subject: Chris Billings

I have examined one (1) document with the known handwriting and initials of Chris Billings[1]. For the purpose of this examination I have labeled this exhibit as "K1"[2].

Footnote by petitioner

[1] "K1" is the same document which attached by petitioner to United States Court of Appeals under Title of exhibit

[2] Chris Billings was the production manager at the time which terminated prior to petitioner's termination by G.T.I in relation to petitioner's discrimination claim. After sales of company without new owner's knowledge he rehired by the same human resource manager to be used for creation of back dated forged documents for Mark Ferguson, counsel for defendant. Chris Billings

Today I have compared the handwriting and initials of Chris Billings on the "K"[3] document to the handwriting and signatures on the Questioned document, identified herin as "Q1" to determine if the author of the handwriting and initials on the "K" document was the same person who authored the handwriting and name of Joe Thompson on the Questioned Document, a New Employee Or Change of Status Notice dated June 13, 2003.

Based upon thorough analysis of these items, and from an application of accepted forensic document examination, tools, principles and techniques, it is my professional opinion that the same person authored the handwriting and name of Joe Thompson on the Questioned Document. Chris Billings did indeed author the handwriting and name of Joe Thompson on the Questioned Document, Q1.

I am willing to testify to this fact in a court of law and I will prove to the Court that my opinion is correct. My Curriculum Vitae is attached and incorporated herein by reference.

Footnote by petitioner (continued)

2 (cont'd) and Mark Ferguson created and forged more documents than the others involved in this matter of forgery

3 "K" document is part of defendant's attachments for summary judgment (DOC #80, 81-09/20/2005) and his response to plaintiff's opposition to defendant's second motion for summary judgment (DOC #113, 4/12/2006, page 10, 3rd paragraph) for cover up of discrimination.

Respectfully submitted,

Signature
Wendy S. Carlson

State of Colorado)
) SS.
County of Denver)

Sworn and subscribed before me this 13th day of June, 2008.

Bonnie K. Northrop
Notary Public
My commission expires 9/13/08

Appendix D

Johnson County Kansas District Court

CASE NO : 04CR01329
Division/Judge : 16/JOHN ANDERSON III
NAME : DANESHVAR, BIJAN
DEF ATTY :
PROS ATTY : DAVIES

R/S/DOB PB
W/M 02/17/45

12/01/2004 CHANGED STATUS FROM "P" TO "C"
12/01/2004 (Removed) ADDL COST NEW WIT 33.32
11/22/2004 FILE STAMP 11/22/2004, JOURNAL ENTRY OF JUDGMENT
11/17/2004 CHANGED STATUS FROM "C" TO "P"
11/17/2004 ADDL COST NEWWIT 33.32
11/09/2004 FILE STAMP 11/9/2004, WITNESS AFFIDAVIT
11/09/2004 FILE STAMP 11/9/2004, WITNESS AFFIDAVIT
11/08/2004 CHANGED STATUS FROM "O" TO "C"
11/08/2004 COUNT 5 21-3517 FINDING DISMISSED BY PROSECUTION (JA)(GL)
11/08/2004 COUNT 4 21-3412 TRIAL TO THE COURT ,FINDING NOT GUILTY (JA)(GL)
11/08/2004 COUNT 3 21-3517 TRIAL TO THE COURT ,FINDING NOT GUILTY (JA)(GL)
11/08/2004 COUNT 2 21-3517 TRIAL TO THE COURT ,FINDING NOT GUILTY (JA)(GL)

11/08/2004 COUNT 1 21-3517 PLAINTIFF APPEARS BY J BARTON, DEFENDANT APPEARS WITH ATTORNEY T AREHART,TRIAL TO THE COURT ,FINDING NOT GUILTY,COURT COST TO PLAINTIFF (JA) (GL)

11/01/2004 FILE STAMP 11/1/2004, MOTION TO DISMISS

10/18/2004 SUBPOENA ISSUED TO DA FOR

09/03/2004 COUNT 1 21-3517 PLAINTIFF APPEARS BY S TOTH,DEFENDANT APPEARS BY ATTORNEY T AREHART (JA)(ER)

09/03/2004 SCHED. GO COURT TRIAL on 11/08/04,01:30pm,Div 16

07/01/2004 COUNT 1 21-3517 PLAINTIFF APPEARS BY S TOTH,DEFENDANT APPEARS WITH ATTORNEY T AREHART (JA)(GL)

07/01/2004 SCHED. DIVERSION on 09/03/04,09:00am,Div 16

06/2[illegible]/2004 COUNT 5 21-3517 DEFENDANT ARRAIGNED ,READING WAIVED ,PLEA NOT GUILTY (BMC)(DR)

06/25/2004 COUNT 4 21-3412 DEFENDANT ARRAIGNED ,READING WAIVED ,PLEA NOT GUILTY (BMC)(DR)

06/25/2004 COUNT 3 21-3517 DEFENDANT ARRAIGNED ,READING WAIVED ,PLEA NOT GUILTY (BMC)(DR)

06/25/2004 COUNT 2 21-3517 DEFENDANT ARRAIGNED ,READING WAIVED ,PLEA NOT GUILTY (BMC)(DR)

06/25/2004 COUNT 1 21-3517 PLAINTIFF APPEARS BY R NORDEEN,DEFENDANT APPEARS WITH ATTORNEY T AREHART,DEFENDANT ARRAIGNED ,READING WAIVED ,PLEA NOT GUILTY (BMC)(DR)

06/25/2004 SCHED. NO GO COURT TRIAL on 07/01/04, 11:30am,Div 16

06/24/2004 FILE STAMP 06/23/04, FILM DATE 06/23/04 MICR # 945, SO RETURN WARRANT EXECUTED 061604

06/18/2004 FILE STAMP 6/17/04, FILM DATE 06/17/04 MICR # 90, BOND FILED

06/16/2004 SCHED. AR on 06/25/04,1:30pm,Div6

06/16/2004 BOND RECEIPT# 0401085, $2000.00, BIJANN DANESHVAR

06/16/2004 SCHED. ARRAIGNMENT on 06/16/04,04:30pm,Div 5

06/16/2004 WARRANT W0403722 EXECUTED RETURN

06/02/2004 FILE STAMP 06/01/04, FILM 06/01/04 MICR #281, CASE MICRO

06/01/2004 WARRANT W0403722 ISSUED, BOND 2,000 CA-SU

06/01/2004 SET BOND 2000.00, CA-SU

06/01/2004 JUDGE JA ASSIGNED TO CASE

06/01/2004 INITIAL CHARGE# 21-3517 SEXUAL BATTERY/TOUCHING>16 FILED INITIAL CHARGE# 21-3517 SEXUAL BATTERY/TOUCHING>16 FILED INITIAL CHARGE# 21-3517 SEXUAL BATTERY/TOUCHING>16 FILED INITIAL CHARGE#21-3412 BATTERY FILED

INITIAL CHARGE#21-3517 SEXUAL BATTERY/TOUCHING>16 FILED

06/01/2004 CASE FILED, Agency JCSO, Agency Rpt# 03-013550